Office - Supreme Court, U.S.
FILED
AUG 4 1982
ALEXANDER L. STEVAS,
CLERK

82-200

No. ____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM ARTHUR WIDGERY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CHARLES ROSENBLEET
1899 L Street, N.W. Suite 605
Washington, D.C. 20036
(202) 296-6627

JOHN MULLER
11 S. Meridian, Suite 810
Indianapolis, IN 46204
(317) 635-5511
Counsel for Petitioner

August 4, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether the petitioner was denied his right to a fair trial when the prosecution did not disclose material evidence favorable to the defense and knowingly used perjured testimony from its key witness to obtain a conviction.

2. Whether an incorrect standard of review, in direct conflict with other circuit courts of appeal, was applied in evaluating petitioner's motion for new trial on the grounds of perjured testimony of a key government witness, under Rule 33 of the Federal Rules of Criminal Procedure.

3. Whether petitioner was entitled to an evidentiary hearing in connection with his motion for new trial where he alleged the denial of his right to a fair trial in the prosecution's suppression of exculpatory evidence and knowing use of perjured testimony.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND RULES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
1. The Decision Below Represents A Significant Departure From Prior Supreme Court Holdings Interpreting The Constitutional Requirement Of Due Process	7
2. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals As To The Standard Of Review In Evaluating Motion For New Trial Under Rule 33 Of The Federal Rules Of Criminal Procedure	11
3. The Decision Below In Denying A Request For An Evidentiary Hearing In Connection With Motion For New Trial So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision	16
CONCLUSION	19
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
Alcorta v. *Texas*, 355 U.S. 28 (1957)	8
Berry v. *Georgia*, 10 Ga 511 (1851)	12, 13
Brady v. *Maryland*, 373 U.S. 83 (1963)	7, 9
Bruno v. *United States*, 180 F.2d 393 (D.C. Cir. 1950)	18
DeMarco v. *United States*, 415 U.S. 449 (1974)	17
Emmett v. *Ricketts*, 397 F.Supp. 1025 (N.D. Ga. 1975)	10
Giglio v. *United States*, 405 U.S. 150 (1972)	7, 9, 15
Gordon v. *United States*, 178 F.2d 896 (6th Cir. 1949)	13
Larrison v. *United States*, 24 F.2d 82 (7th Cir. 1928)	11, 12, 13, 14, 15, 16
Mesarosh v. *United States*, 352 U.S. 1 (1956)	15
Mooney v. *Holohan*, 294 U.S. 103 (1935)	7, 8, 9
Napue v. *Illinois*, 360 U.S. 264 (1959)	7, 9
United States v. *Agurs*, 427 U.S. 97 (1976)	10, 11, 18
United States v. *Bryant*, 439 F.2d 642 (D.C. Cir. 1971)	10
United States v. *Caldwell*, 543 F.2d 1333 (D.C. Cir. 1974)	10
United States v. *Gabriel*, 597 F.2d 95 (7th Cir. 1979), *cert. denied*, 444 U.S. 858 (1979)	13
United States v. *Jackson*, 579 F.2d 553 (10th Cir. 1978), *cert. denied*, 439 U.S. 981 (1978)	14
United States v. *Johnson*, 327 U.S. 106 (1946)	11
United States v. *Krasny*, 607 F.2d 840 (9th Cir. 1979)	14
United States v. *Mackin*, 561 F.2d 958 (D.C. Cir. 1977)	14
United States v. *McCord*, 509 F.2d 334 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 930 (1975)	10
United States v. *Meyers*, 484 F.2d 113 (3d Cir. 1973)	13
United States v. *Runge*, 593 F.2d 66 (8th Cir. 1979), *cert. denied*, 444 U.S. 859 (1979)	12, 14
United States v. *Smith*, 433 F.2d 149 (5th Cir. 1970)	13
United States v. *Stofsky*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976)	13
United States v. *Trevino*, 556 F.2d 1265 (5th Cir. 1977)	10

Table of Authorities Continued

	Page
United States v. *Wallace*, 528 F.2d 863 (4th Cir. 1976)	13
United States v. *Ward*, 544 F.2d 975 (8th Cir. 1976)	13, 17
United States v. *Widgery*, 636 F.2d 200 (8th Cir. 1980)	3
United States v. *Wright*, 625 F.2d 1017 (1st Cir. 1980)	13
Walker v. *Johnston*, 312 U.S. 275 (1941)	18
MISCELLANEOUS:	
ABA Standards, Discovery & Procedure Before Trial, § 2.1(d) (1970)	10
2 Wright, *Federal Practice and Procedure*, § 557	13
8A *Moore's Federal Practice*, para. 33.06[1]	13
18 U.S.C.A., Rule 33, *Federal Rules of Criminal Procedure*	2, 11, 12, 18
28 U.S.C.A. § 2255	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. ____

WILLIAM ARTHUR WIDGERY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner William Arthur Widgery respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 31, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, App. 1a-6a.

The United States District Court for the Western District of Missouri rendered an original opinion on February 11, 1981, not yet reported, which is reproduced in the Appendix hereto, App. 8a-15a; and the District Court rendered a second opinion (subsequent to remand from the Eighth Circuit Court of Appeals) on June 26, 1981, not yet reported, which appears in the Appendix hereto, App. 16a-21a.

An opinion by the United States Court of Appeals for the Eighth Circuit, rendered at a prior stage of the present proceedings is reported at 636 F.2d 200 (8th Cir. 1980).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 31, 1982. A timely petition for rehearing was denied on May 6, 1982. See App. 7a, *infra*. An application for extension of time within which to file this petition for certiorari was timely filed and approved on June 21, 1982, extending the time for filing this petition to and including August 4, 1982. This petition for certiorari was filed within the time presented.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and Rule 20.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND RULES

Fifth Amendment, United States Constitution:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . .

Federal Rules of Criminal Procedure, Rule 33, 18 U.S.C.A.:

> **New Trial**
>
> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending

the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

On October 4, 1979, petitioner, William Arthur Widgery was charged in a twenty-eight count indictment filed with the United States District Court for the Western District of Missouri with mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343 (1976). The indictment alleged in essence that petitioner had submitted fraudulent purchase orders for car washing equipment to Robo Wash, Inc., a Missouri corporation, which in turn used them as security for bank loans.

After a trial by jury, on January 27, 1980, petitioner was convicted of ten counts and acquitted of eighteen counts of the indictment. On May 9, 1980, petitioner, a 43 year old businessman with no prior criminal history, was sentenced to a term of five years imprisonment on each count and a $500.00 fine on each count, the sentences to be served concurrently. An appeal was taken to the United States Court of Appeals for the Eighth Circuit, which affirmed convictions on eight of the ten counts and set aside the convictions on two of the counts for want of sufficient evidence. *United States* v. *Widgery*, 636 F.2d 200 (8th Cir. 1980).

On December 29, 1980, petitioner filed a motion for new trial on grounds of newly discovered evidence. That motion and supplements[1] thereto resulted in denials of peti-

---

[1] The appeal was remanded to the District Court upon petitioner's motion for supplementation with additional evidence. Thus the District Court issued two opinions denying the motion.

tioner's new trial motion in the District Court and in the Eighth Circuit Court of Appeals.

During the period covered by the indictment, Robo Wash was engaged in the manufacture and sale of automatic car washing equipment. Robo Wash maintained a network of distributors throughout the country who sold and serviced Robo Wash equipment. The president of Robo Wash was Mr. Braxton Jones, who was directly in charge of its day to day activities. In early 1977, Robo Wash was in serious financial difficulty and was in default on a large outstanding loan from Goppert Bank of Kansas City, Missouri. Mr. Jones handled all of the financial transactions with Goppert Bank for Robo Wash.

In February of 1977, Robo Wash solicited petitioner to act as a distributor and to provide managerial and administrative advice in the hope that he could reverse the deteriorating financial condition of the company. An agreement was reached whereby petitioner was to generate a profit for Robo Wash so that its tax return for the fiscal year ending September 30, 1977, would show a before-tax profit on line 28 (of its corporate tax return) of $135,000, or petitioner would agree to pay the difference.[2] In return, petitioner was to receive a large block of lettered Robo Wash stock.

Robo Wash's financial plight was so severe during this time that it could not keep inventory on hand to service orders. In addition, it did not keep the parts on hand necessary to manufacture the equipment to fill the orders. When an order was received by Robo Wash,

---

[2] The figure of $135,000 was designated because Robo Wash had a loss carry forward of $135,000 that it would lose if it were not exercised in the taxable year ending September 30, 1977.

Braxton Jones prepared an invoice and sight draft and took them to the Goppert Bank and obtained financing, using the invoice and sight draft as security. The funds were then used to purchase the parts to manufacture the equipment. Usually, this resulted in a three to six month delay between receipt of an order and delivery of the equipment.

During the late summer and early fall of 1977, petitioner submitted three purchase orders to Robo Wash for equipment totalling approximately $197,000. Braxton Jones took the three orders submitted by petitioner to the Goppert Bank and obtained loans totalling $145,000 using the orders as security. In late February of 1978, the Goppert Bank terminated its arrangement with Robo Wash and called all Robo Wash loans due. Robo Wash defaulted on the loans, and the equipment ordered by petitioner's customers was never delivered, and the sales never completed.

At the trial of petitioner, the government alleged that the orders submitted by Mr. Widgery were bogus. The government contended that petitioner's motive for submitting fraudulent purchase orders was to comply with the terms of the agreement to generate $135,000 profit on the Robo Wash tax return. The chief prosecution witness supporting this position was Braxton Jones. Mr. Jones testified at length about the financial relationship between Robo Wash and the Goppert Bank, and presented it as a correct business relationship in which he had unwittingly used bogus orders submitted by the petitioner.

Petitioner's position at trial was that the orders he submitted were legitimate, although contingent upon financing. Two of the orders were contingent upon financing by the Small Business Administration and the third

by a Florida savings and loan bank. Petitioner further contended that Mr. Jones knew of the contingencies associated with these orders; and the "fraud" that was perpetrated occurred when Mr. Jones submitted the invoices on those orders to the bank as security for loans without explaining to the bank the contingencies of which he was directly aware.

Subsequent to the trial, petitioner discovered new evidence that established Braxton Jones had defrauded Goppert Bank on a number of loan transactions totally unrelated to petitioner. Thus, Jones had a motive to commit perjury in order to implicate petitioner and exculpate himself from any wrongdoing. Indeed, petitioner proffered newly discovered evidence that showed more than twenty incidents where Jones had committed perjury at trial. One of the key areas of new evidence related to evidence that Braxton Jones had obtained a $40,000 loan from Goppert Bank on November 2, 1977, as a result of submitting an invoice from a Jurgens Vrooman, Inc. in Beatrice, Nebraska when there was no such order or sale. Mr. Jones had submitted a phony invoice and sight draft in the amount of $48,544.93 for Robo Wash equipment to Jurgens Vrooman; no sale had ever been completed and no purchase order had ever been transmitted to Robo Wash. Further, petitioner submitted evidence in support of his new trial motion that the government was notified of this fraudulent transaction nearly two years before his trial; an officer of Goppert Bank signed an affidavit reporting the circumstances of the fraudulent Jurgens Vrooman transaction to the F.B.I. office in Kansas City on March 30, 1978.

Another key area that petitioner was able to develop to substantiate perjured testimony on the part of Jones related to the before-tax profit of Robo Wash for the

taxable year ending September 30, 1977. In support of his testimony that Widgery's motive for submitting bogus purchase orders was to meet the $135,000 requirement of the agreement, Jones testified that Robo Wash did not make a profit for the taxable year ending 1977. The tax return was never produced at trial. When the tax return did surface after the trial, it established that Robo Wash had a line 28, before-tax profit of nearly $500,000!

Petitioner presented evidence of the Jurgens Vrooman fraud, the government's knowledge of the fraud and the tax return to the District Court in a motion for new trial and requested an evidentiary hearing. The District Court determined that an evidentiary hearing was unwarranted and denied the motion for new trial. The Court of Appeals affirmed. See pp. 1a, 3a of Appendix hereto.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Represents A Significant Departure From Prior Supreme Court Holdings Interpreting The Constitutional Requirement Of Due Process.

Petitioner's right to a fair trial under the due process clause of the Fifth Amendment was violated where the government used perjured testimony and failed to disclose at trial certain material evidence favorable to the petitioner in violation of *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Giglio* v. *United States*, 405 U.S. 150 (1972).

This Court has made it abundantly clear since deciding *Mooney* v. *Holohan*, that the prosecutor's knowing and intentional use of perjured testimony in obtaining a conviction violates a defendant's due process rights and denies him a fair trial. 294 U.S. at 112.

The Eighth Circuit has *not* challenged petitioner's basic premise that the key government witness, Braxton Jones, gave perjured testimony at trial to conceal his own criminal activities. The Eighth Circuit did find that the petitioner's evidence that the government had knowledge of the perjury was insufficient, holding that: "The district court found, and we agree, that the evidence relating to the government's knowledge of the alleged perjury is based on speculation and conjecture." See p. 4a of Appendix hereto.

The Eighth Circuit, though conceding petitioner's newly discovered evidence showed "that the bank [Goppert] reported the circumstances of the fraudulent transaction [Jurgens Vrooman] to the F.B.I. office in Kansas City on March 30, 1978" (see p. 4a of Appendix hereto), does not acknowledge that the F.B.I. is part of the prosecution team and that knowledge possessed by this investigative arm of the prosecution can be imputed to the prosecutor.

The Eighth Circuit felt that for there to be "governmental corruption of the truth finding process resulting in a deprivation of fundamental due process", there must be "specific instances of prosecutorial misconduct, such as the use of perjured testimony." See p. 4a of Appendix hereto. The Eighth Circuit approves the District Court's statement that: "the record in this case, as well as defendant's present motion, is utterly devoid of any evidence that *counsel for the government* actually knew or should have known that Braxton Jones' testimony might be perjured." (emphasis added) See p. 12a of Appendix hereto. The Eighth Circuit has misconstrued the case law from this Court and other controlling precedents in reaching its erroneous conclusion.

This Court initially expanded the *Mooney* standard in *Alcorta* v. *Texas*, 355 U.S. 28 (1957), by holding the

prosecutor's knowing failure to correct inculpatory, perjured testimony also violated due process. *Id.* at 31-32. In *Napue* v. *Illinois*, this Court further expanded *Mooney*, holding the prosecutor's knowing failure to correct perjured testimony, relating solely to the credibility of the witness, constituted a violation of due process. 360 U.S. at 269. This Court in *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) found the government's failure to make available exculpatory evidence specifically requested by the defendant also constituted a violation of due process, where the evidence was material either to guilt or punishment.[3] Further, evidence that would tend to impeach a material government witness is *Brady* material. *See Giglio* v. *United States*, 405 U.S. at 154.

The Eighth Circuit's decision is in direct conflict with *Giglio* v. *United States*, 405 U.S. 150 (1972). *Giglio* involved an allegation of perjury by a government witness who testified that no promises had been made to him by the government in exchange for his testimony. After trial, it was discovered that an Assistant U.S. Attorney who was not the prosecutor in the case had promised the witness that he would not be prosecuted if he testified. The Assistant U.S. Attorney who tried the case had no knowledge of this promise. The Court however imputed the knowledge to the government, holding that "whether the nondisclosure was the result of negligence or design, it is the responsibility of the prosecutor." 405 U.S. at 154.

A prosecutor should know of evidence if it is in his possession or in the possession of any agency involved in

---

[3] A specific *Brady* request was made by petitioner's trial counsel herein.

the prosecution.[4] In *United States* v. *Agurs*, 427 U.S. 97 (1976), the Court made note of the situation where the "prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." Id. at 103. Thus, circumstances which would demonstrate perjury by a prosecution witness, although not specifically known to the prosecutor, are imputed to his knowledge because they are possessed by an investigative arm of the prosecution.

Thus, governmental knowledge of the chief prosecution witness' perjured trial testimony is not based on "speculation and conjecture" as held by the Eighth Circuit. See p. 4a of Appendix hereto. This was a "specific instance of prosecutorial misconduct" by the "use of 'known perjured testimony,' in a deprivation of fundamental due process." See p. 4a of Appendix hereto.[5]

---

[4] "The 'prosecution' involves all agencies of the federal government involved in any way in the prosecution of criminal litigation." *United States* v. *McCord*, 509 F.2d 334, 342 n.14 (D.C. Cir. 1974) *cert. denied*, 424 U.S. 930 (1975). For similar holdings, see *United States* v. *Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1352 n.91 (D.C. Cir. 1974); *United States* v. *Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971); *Emmett* v. *Ricketts*, 397 F.Supp. 1025, 1041 (N.D. Ga. 1975). See also, *ABA Standards, Discovery & Procedure Before Trial*, § 2.1(d) (1970).

[5] The government used the testimony of its key witness, Braxton Jones to establish a motive for Mr. Widgery's submission of the allegedly false purchase orders. The government argued strenuously that Widgery submitted the phony purchase orders in order to meet his obligation to produce $135,000 of net profit on line 28 of the Robo Wash tax return. Braxton Jones supported this position through his testimony that the Robo Wash tax return did not show a profit. In fact, in his motion for new trial, petitioner was able to substantiate that Jones had perjured himself on this key "motive" issue through

The obvious conflict between the decision of the Eighth Circuit in this case and the clear line of cases emanating from this Court justifies the grant of certiorari to review the judgment below.

2. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals As To The Standard Of Review In Evaluating Motion For New Trial Under Rule 33 Of The Federal Rules Of Criminal Procedure.

The Court should issue a writ of certiorari in this action in order to resolve a direct and specific conflict among the circuits on the application of *Larrison* v. *United States*, 24 F.2d 82 (7th Cir. 1928).[6]

Petitioner argued in his motion for new trial that the government knowingly used perjured testimony at his trial. In the alternative, petitioner argued that, even if the government did not know of the perjury at the time, a new trial is required under *Larrison* if the perjury "might" have affected the outcome. Petitioner submitted

---

the production of the tax return for the fiscal year ending September 30, 1977, showing a taxable income on line 28 of $496,604.

Certainly, in the context of this fraud prosecution, where the government was relying upon a single motive to convict the defendant, and attempting to establish this motive through the testimony of one key witness, the government, at the very least, should have known the true facts as documented by the actual tax return and, therefore, the perjury of its chief witness. Otherwise, a situation would exist involving the "corruption of the truth-seeking function of the trial process." *United States* v. *Agurs*, *supra* at 104.

[6] This Court has not enunciated the standard for determining when a new trial is to be granted where perjury has occurred at trial. *United States* v. *Johnson*, 327 U.S. 106, 111 n.5 (1946).

that the correct standard of review of his motion was that stated in *Larrison* which requires a new trial when:

> (a) the Court is reasonably well-satisfied that the testimony given by a material witness is false;
>
> (b) That without it the jury *might* have reached a different conclusion;
>
> (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial. [Original emphasis]

Id. at 87-88.

The Eighth Circuit affirmed the District Court's finding that there was no proof of governmental knowledge of the perjury or other misconduct, and therefore, rejected the application of *United States* v. *Runge*, 593 F.2d 66 (8th Cir. 1979), *cert. denied*, 444 U.S. 859 (1979), the standard applicable when there is governmental misconduct. See p. 4a of Appendix hereto.

The Court then rejected the *Larrison* test without discussion, and applied the stricter standard of review contained in the traditional Criminal Rule 33 or "*Berry*" test, which was first stated in *Berry* v. *Georgia*, 10 Ga. 511 (1851). Under Rule 33 a new trial is to be granted only if the following criteria are met:

> 1. The evidence must be in fact newly discovered, that is discovered since the trial;
>
> 2. Facts must be alleged from which the court may infer diligence on the part of the movant;
>
> 3. The evidence relied upon must not be merely cumulative or impeaching;
>
> 4. It must be material to the issues involved; and

> 5. It must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. *Ward*, 544 F.2d 975, 977 (8th Cir. 1976).

There is a significant split among the circuits on the application of the *Larrison* test. *See* 8A *Moore's Federal Practice*, para. 33.06[1]; 2 Wright, *Federal Practice and Procedure*, § 557. The majority of the circuits have adopted the position taken in *Larrison: United States* v. *Wright*, 625 F.2d 1017, 1020 (1st Cir. 1980); *United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir. 1973); *United States* v. *Wallace*, 528 F.2d 863, 866 (4th Cir. 1976); *United States* v. *Smith*, 433 F.2d 149, 150-151 (5th Cir. 1970); *Gordon* v. *United States*, 178 F.2d 896, 900 (6th Cir. 1949); *United States* v. *Gabriel*, 597 F.2d 95, 98 (7th Cir. 1979), *cert. denied*, 444 U.S. 858 (1979).

In 1975 the Second Circuit Court of Appeals became the first circuit to reject the *Larrison* test in *United States* v. *Stofsky*, 527 F.2d 237 (2d Cir. 1975), *cert. denied* 429 U.S. 819 (1976).

> While the *Berry* "probability" standard discussed above generally governs challenges to a previous trial based upon newly-discovered evidence, a less stringent test has frequently been voiced in response to revelations of perjury. Under that test, which appears to have had its origins in *Larrison* v. *United States* 24 F.2d 82, 87 (7th Cir. 1928) a new trial will be granted if, without the false testimony, the jury "might have reached a different conclusion."
>
> Most Circuits have expressed their allegiance to Larrison. *See generally*, 8A Moore's *Federal Practice* §§ 33.04(1) & 33.06(1). In recent years, however, we have expressed increasing discomfort with the *Larrison* test in cases that do not involve prosecutorial misconduct.

Id. at 245.

The Court felt that evidence that the trial contained perjured testimony was merely one form of newly discovered evidence, and that there was no significant distinction between new evidence of perjured testimony and other new evidence such that a different standard of review should apply.

In 1979 the Ninth Circuit adopted the Second Circuit's position in rejecting the *Larrison* test in *United States* v. *Krasny*, 607 F.2d 840, 842-845 (9th Cir. 1979) *cert. denied* 455 U.S. 942. Judge Ely dissented from that decision.

> Not only do I believe that the "might" or "possibility" standard applied by the *Larrison* line of cases is the more appropriate standard when, as here, the chief prosecution witness recants material portions of her testimony, but I consider the application of such a test required by the teaching of *Mesarosh* v. *United States*, 352 U.S. 1, 77 S. Ct. 1, 1 L.Ed 2d 1 (1956).

Id. at 847.

Both the Tenth Circuit and the District of Columbia Circuit have recognized the conflict among the circuits, but have declined to adopt a standard in cases which they felt would not merit a new trial under either standard. *United States* v. *Jackson*, 579 F.2d 553 (10th Cir. 1978), *cert. denied*, 439 U.S. 981 (1978); *United States* v. *Mackin*, 561 F.2d 958, 961 (D.C. Cir. 1977). The Eighth Circuit cites *Larrison* in *United States* v. *Runge*, 593 F.2d 66 (8th Cir. 1979), *cert. denied*, 444 U.S. 859 (1979), but does not specifically address the issue.

The petitioner urges the Court to issue a writ of certiorari in this case to establish a uniform standard in the federal courts for the review of motions for new trial. The need for a consistent standard is particularly apparent in this case. The majority of the transactions which were the subject of the indictment occurred in the Seventh Circuit,

which recognizes the *Larrison* standard. The petitioner's substantive rights should not be determined by the fact that the government chose to prosecute him in the Eighth Circuit, which apparently does not recognize *Larrison*. This case presents an appropriate vehicle for the Court to exercise its supervisory power over the federal courts and to insure uniformity in review of new trial motions.

The petitioner further urges that the standard adopted be that in *Larrison*, which would permit a new trial, where there has been perjury in the trial, upon a showing that the perjury "might" have affected the verdict. Petitioner submits that fundamental notions of due process and fair play require that criminal convictions not be obtained through false testimony. If due process means anything, it means that the government should not use perjured testimony, even unwittingly, to gain a conviction. *Giglio* v. *United States*, 405 U.S. 150, 154 (1972).

Perjured testimony is not only an injustice to the defendant in a criminal case, it is an affront to the court and jury as well. It subverts the very foundation of the judicial process by corrupting the fact-finding process. As this Court pointed out in *Mesarosh* v. *United States*, 352 U.S. 1 (1956) when it found that perjured testimony had

> poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurities. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

Id. at 14.

The government has the ability to eliminate perjured testimony from its case and has an obligation to the court and the defendant to do so. The prophylactic effect of the *Larrison* rule will be to promote closer scrutiny by the government of questionable witnesses. This is in accord with the widely held view that the prosecutorial function is not to obtain a conviction, but to promote the ends of justice.

At issue here is the integrity of the federal prosecutorial system. In the final analysis, this Court will determine whether or not the integrity of the federal prosecutorial system is of sufficient importance to devote judicial time and energy necessary to retry cases involving perjured testimony.

3. The Decision Below In Denying A Request For An Evidentiary Hearing In Connection With Motion For New Trial So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

In the proceedings below, petitioner argued that the peculiar circumstances of his case entitled him, at a minimum, to an evidentiary hearing. In his motion for new trial, petitioner established that the government's chief witness, Braxton Jones, committed perjury, that Jones defrauded Goppert Bank on similar transactions unrelated to petitioner, and that the government was told of this fraud. The government never denied that Braxton Jones committed perjury, or that he was involved in an independent fraud of Goppert Bank of which petitioner was unaware at the time of trial. Further, the government never denied the F.B.I. agent investigating the case was told of Jones' fraud by official(s) from the Goppert Bank.

Based on this evidence, petitioner requested a new trial on grounds of governmental misconduct and material perjured testimony; or, in the alternative, an evidentiary hearing in which to explore the government's conduct (and knowledge) in relation to the newly discovered evidence, and its failure to disclose that evidence to the defense. The District Court and thereafter the Eighth Circuit denied the motion for new trial on the grounds that petitioner failed to establish the government had knowledge of the perjured testimony, and further denied petitioner's request for an evidentiary hearing. See pp. 3a, 4a of Appendix hereto. Petitioner submits that based on this record, he was entitled to an evidentiary hearing in order to explore these issues. *DeMarco* v. *United States*, 415 U.S. 449 (1974).

The need for a hearing here was further compelled by the fact that the trial judge who had presided over the first three days of testimony withdrew from the trial and was replaced on the fourth day by the second trial judge, who ultimately completed the trial of the case in two additional days of testimony. The second judge, who ruled on the post-trial motions filed by petitioner, did not hear the majority of the government's testimony, including the testimony of its key witness, Braxton Jones. Thus, the ability of the presiding judge to observe the demeanor and weigh the credibility of the witness at trial was lost in this case in connection with the testimony of Jones, which formed the basis of petitioner's post-trial claims regarding perjured testimony. *Cf. United States* v. *Ward*, 544 F.2d 975, 976 (8th Cir. 1976). Certainly, an evidentiary hearing on the new trial motion would have permitted the trial judge the opportunity he lost by not hearing or viewing the evidence.

It is well settled that the standard of review applicable to a motion for new trial varies depending on the nature of the new evidence and the government's conduct in relation to it. *See United States* v. *Agurs*, 427 U.S. 97 (1976). It is, therefore, essential that a trial court reviewing a motion for new trial alleging governmental misconduct and perjured testimony have all of the evidence before it regarding the government's conduct and allow a defendant (and the court) the opportunity to adequately explore the government's alleged misconduct. Otherwise, the government is able to effectively "stonewall" the case, since it is the sole source of information relative to its own conduct.

It is clear that a hearing would have been required if petitioner's motion were brought pursuant to 28 U.S.C. § 2255:[7] "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

Where the issues raised in a new trial motion are constitutional ones, as are the petitioner's here, the purpose of a 2255 motion and a new trial motion under Rule 33 are substantially the same. *Cf. Bruno* v. *United States*, 180 F.2d 393, 394 (D.C. Cir. 1950). The chief distinction is that the defendant must be incarcerated to raise the former. This distinction has no impact on whether or not

---

[7] "If an issue of fact is presented the practice appears to have been to issue the writ [of habeas corpus], have the petitioner produced, and hold a hearing at which evidence is received. This is, we think, the only admissible procedure." *Walker* v. *Johnston*, 312 U.S. 275, 285 (1941).

evidentiary hearing on the motion is appropriate. There is no logic in requiring a defendant to become incarcerated in order to be entitled to an evidentiary hearing on his motion.

In light of all of these circumstances, petitioner was entitled to an evidentiary hearing herein.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

CHARLES ROSENBLEET
1899 L Street, N.W., Suite 605
Washington, D.C. 20036
(202) 296-6627

JOHN MULLER
11 S. Meridian, Suite 810
Indianapolis, IN 46204
(317) 635-5511
Counsel for Petitioner

August 4, 1982